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BellSouth Telecommunications, Inc
333 Commerce Street
Suite 2101
Nashville, TN 37201-3300

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T.R.A. DOCKET ROOM

Guy M. Hicks
General Counsel

615 214 6301
Fax 615 214 7406

guy.hicks@bellsouth.com

November 22, 2005

VIA HAND DELIVERY

Hon. Ron Jones, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

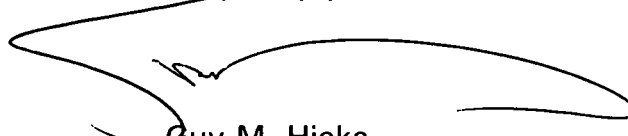
Re: *Petition of MCImetro Access Transmission Services, LLC for Arbitration of Certain Terms And Conditions of Proposed Agreement with BellSouth Telecommunications, Inc. Concerning Interconnection and Resale Under the Telecommunications Act of 1996*
Docket No. 05-00231

Dear Chairman Jones:

Enclosed are the original and fourteen copies of BellSouth's *Motion to Dismiss or Move Arbitration Issues*.

A copy is being provided to counsel of record.

Very truly yours,



Guy M. Hicks

GMH:ch

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee**

In Re: *Petition of MCImetro Access Transmission Services, LLC for Arbitration of Certain Terms And Conditions of Proposed Agreement with BellSouth Telecommunications, Inc. Concerning Interconnection and Resale Under the Telecommunications Act of 1996*

Docket No. 05-00231

**BELLSOUTH TELECOMMUNICATIONS, INC.'S MOTION
TO DISMISS OR MOVE ARBITRATION ISSUES**

Pursuant to the Prearbitration Officer's instructions at the November 4, 2005 Status Conference, BellSouth Telecommunications, Inc. ("BellSouth") files this Motion to Dismiss or Move Arbitration Issues ("*Motion*"). For the reasons articulated below, the Tennessee Regulatory Authority ("TRA") should dismiss Issue Nos. 18, 19, and 23 from the arbitration, because these issues are within the exclusive jurisdiction of the Federal Communications Commission ("FCC"). Moreover, the TRA should move Issue No. 11 to the TRA's Generic Docket (Docket No. 04-00381) because the identical issue is being decided in that proceeding, causing the TRA to needlessly expend resources hearing issues in two dockets even though MCImetro Access Transmission Services, LLC ("MCI") is participating in both dockets. In support of this *Motion*, BellSouth states the following:

1. On August 15, 2005, MCI filed a *Petition for Arbitration* with the TRA pursuant to Section 252 of the Telecommunications Act of 1996 (the "Act"). On September 9, 2005, BellSouth filed its *Response*. Attached

to the *Petition* and *Response* was an *Arbitration Matrix* identifying the issues raised by either Party to be decided in this arbitration.

2. Issues Nos. 18, 19, and 23 in the *Arbitration Matrix* all generally relate to whether Internet Protocol/Public Switched Telephone Network ("IP/PSTN") traffic and Public Switched Telephone Network/Internet Protocol/Public Switched Telephone Network ("PSTN/IP/PSTN") should be subject to reciprocal compensation or access charges for intercarrier compensation purposes.¹ MCI requests that the TRA affirmatively find that all such traffic is local and thus subject to reciprocal compensation charges.²

3. Conversely, BellSouth takes the position that the TRA does not have the authority to make such a finding, because the FCC has exclusive jurisdiction over this traffic. Further, if the TRA disregards the FCC's exclusive jurisdiction, BellSouth asserts that the FCC's current practice of determining the jurisdiction of a call for intercarrier compensation purposes by its physical end points should govern, unless and until the FCC rules otherwise in its *IP-Enabled Services Proceeding*.³ Thus, consistent with pure circuit switched traffic, BellSouth argues that if the physical locations of the originating and terminating points of the call establish that the call is interstate, interLATA, or intraLATA toll, switched access charges should apply. On the other hand, if the physical end points of the call determine that the call is local, then reciprocal compensation should apply. BellSouth

¹ See MCI *Petition* at ¶¶ 27, 29, and 34

² *Id.*

³ WC Docket No. 04-36.

argues that this issue should be controlled by the substantive rulings of the FCC, and, in an apparent attempt to lure the TRA to act in opposition to the FCC's precedent, MCI tries to convince the TRA to ignore both FCC jurisdiction and FCC decisions.

4. Because the FCC has exclusive jurisdiction over IP/PSTN and enhanced PSTN/IP/PSTN traffic, the TRA should dismiss Issue Nos. 18, 19, and 23 from the arbitration for the following reasons.

5. IP/PSTN is voice traffic that *originates* from a computer, IP telephone, or other device in Internet Protocol ("IP") format destined for *termination* to an end user served by the public switched telephone network ("PSTN"). This traffic is routed in IP format over a private internet or the public Internet until it is ultimately handed off to the local service provider (ILEC or CLEC) that provides local telephone service to the terminating end user. As described by MCI, "[a] call originated on a VoIP modem and terminated on a circuit switch would be an example of such traffic." ⁴

6. PSTN/IP/PSTN is traffic that *originates* from an end user of a local exchange company (ILEC or CLEC) using the PSTN, is routed over some type of Internet Protocol facility, such as IP transport or an IP soft switch at some point in the transmission of the call, and is ultimately *terminated* to an end user also served by the PSTN. This traffic is sometimes known as "IP-in-the-middle" traffic. As described by MCI in its *Petition*, "[a] call originated by a circuit switch,

⁴ MCI *Petition* at ¶ 27.

then converted to internet protocol and enhanced with additional features before being terminated on a circuit switch would be an example of such traffic."⁵

7. MCI argues that PSTN/IP/PSTN traffic "presumably is subject to the same treatment of IP/PSTN traffic."⁶ Thus, as argued by MCI, the rules governing IP/PSTN traffic also govern PSTN/IP/PSTN traffic.⁷

8. The FCC determined in the *Vonage Order* that IP/PSTN traffic is jurisdictionally mixed and that the FCC alone has the authority to regulate the interstate portion of the traffic.⁸ Further, the FCC preempted any state regulation of the intrastate portion of the traffic because it found that state regulation "would thwart or impede the lawful exercise of federal authority over the interstate component of the communications."⁹ Accordingly, the TRA has no jurisdiction to address IP/PSTN traffic, including the determination of what method of intercarrier compensation is appropriate in a Section 252 agreement or otherwise.

9. In support of its finding that state commissions have no authority over IP/PSTN traffic, the FCC recognized that ruling otherwise could result in 50 or more different economic regulations on this traffic.

⁵ MCI *Petition* at ¶ 27.

⁶ *Id.*

⁷ For the sake of this *Motion* only, BellSouth agrees. The FCC determined in its *AT&T IP in the Middle Order* (FCC 04-97 at ¶ 12, 15) that the PSTN/IP/PSTN traffic at issue in that proceeding was a telecommunications service subject to access charges. MCI has agreed in the new interconnection agreement to pay access charges for PSTN/IP/PSTN traffic that provides no enhanced functionalities. See Attachment 3, § 7.9.1.1. To the extent MCI's PSTN/IP/PSTN traffic provides enhanced functionalities, the FCC has the exclusive authority to determine what intercarrier compensation regime applies to the traffic.

⁸ See *In the Matter of Vonage Holdings Corporation*, WC Docket No. 03-211 at ¶ 18 (Nov. 12, 2004) (previously defined as "*Vonage Order*")

⁹ *Id.* at ¶ 19.

Allowing Minnesota's order to stand would invite similar imposition of 50 or more additional sets of different economic regulations on DigitalVoice, which could severely inhibit the development of this and similar VoIP services. We cannot, and will not, risk eliminating or hampering this innovative advanced service that facilitates additional consumer choice, spurs technological development and growth of broadband infrastructure, and promotes continued development and use of the Internet. To do so would ignore the Act's express mandates and directives with which we must comply, in contravention of the pro-competitive deregulatory policies the Commission is striving to further.¹⁰

10. Consistent with the national broadband policy set forth in the *Vonage Order*, the TRA should decline to arbitrate and should dismiss Issue Nos. 18, 19 and 23 from this arbitration. Simply put, it is the FCC and the FCC alone that should determine what intercarrier compensation regime applies to this IP/PSTN traffic. As the FCC has articulated in the passage above, this is more than a mere "turf war" between state and federal authorities. Instead, it is necessary to provide the nationally-uniform framework that is essential to incent "continued development and use of the internet."

11. Importantly, based on prior admissions and arguments, MCI should not object to this *Motion*. In fact, MCI's position in the prior BellSouth/MCI arbitration (Docket No. 00-00309) regarding IP telephony was identical to BellSouth's position here. Specifically, in that proceeding, MCI "argue[d] that whether long-distance carriers should pay access charges when utilizing IP telephony is beyond the scope of this arbitration. Instead, WorldCom argues that this issue is clearly within the FCC's jurisdiction."¹¹ Accordingly, the TRA should

¹⁰ *Vonage Order* at ¶ 37.

¹¹ See *In re: Petition of MCImetro Access Transmission Serv., LLC et al for Arbitration of Certain Terms and Conditions of Proposed Agreement with BellSouth Tel.*,

heed MCI's prior arguments, BellSouth's present arguments and the FCC's *Vonage Order* and dismiss these issues from the arbitration.

12. In addition, the TRA should move Issue No. 11 to the Generic Docket (Docket No. 04-0381) for consideration and resolution. This arbitration issue relates to (1) the date MCI must submit a spreadsheet identifying all services that must be transitioned to non-Section 251 services to comply with the expiration of the transition period identified in the FCC's *Triennial Review Remand Order*,¹² and (2) what rates apply if MCI does not identify the services by the specific date ordered pursuant to subsection (1). This issue is identical Issue No. 2 in the Generic Docket. The parties should not be required to spend the time and resources re-arbitrating the issue in this proceeding, especially when a decision in the Generic Docket will likely be rendered prior to a decision in the arbitration. Accordingly, the TRA should move arbitration Issue No. 11 to the Generic Docket for consideration or resolution or alternatively find that the ruling in the Generic Docket on this issue resolves the matter in the arbitration. As a participant in the Generic Docket, MCI cannot reasonably claim to be prejudiced in any fashion by having this issue decided in the Generic Docket – a docket in which the Authority has the benefit of hearing from many stakeholders.

WHEREFORE, BellSouth respectfully requests that the TRA dismiss Issue Nos. 18, 19, and 23 from the arbitration because these issue are

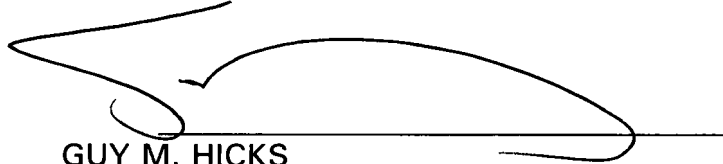
Inc., Interim Order of Arbitration Award, Docket No. 00-00309 at 22 (Apr. 3, 2002) ("*MCI Order*"). Consistent with BellSouth's position in this arbitration, the TRA found in 2002 that "calls using IP, regardless of whether the call is data or voice, should be treated the same as circuit switched traffic subject to FCC Rules for intercarrier compensation " *MCI Order* at 23.

¹² FCC 04-290, WC Docket No. 04-313, CC Docket No. 01-338 (Feb. 4, 2005) ("*TRRO*").

within the exclusive jurisdiction of the FCC. Moreover, the TRA should move Issue No. 11 to the TRA's Generic Docket (Docket No. 04-00381), because the identical issue is being decided in that proceeding.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

A handwritten signature in black ink, appearing to read "Guy M. Hicks", is written over a horizontal line.

GUY M. HICKS
JOELLE J. PHILLIPS
333 Commerce Street, Suite 2101
Nashville, Tennessee 37201-1800
(615) 214-6301

R. DOUGLAS LACKEY
JAMES MEZA III
675 West Peachtree Street, N.E., Suite
4300
Atlanta, Georgia 30375

CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2005, a copy of the foregoing document was served on the following, via the method indicated:

- ☐ Hand
- ☐ Mail
- ☐ Facsimile
- ☐ Overnight
- ☒ Electronic

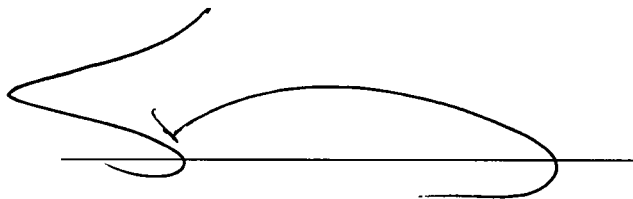
James L. Murphy III
Boult, Cummings, et al.
1600 Division Street, Suite 700
P.O. Box 340025
Nashville, TN 37203
jmurphy@boultcummings.com

- ☐ Hand
- ☐ Mail
- ☐ Facsimile
- ☐ Overnight
- ☒ Electronic

Dulaney L. O'Roark III
Kennard B. Woods
MCI, Inc.
Six Concourse Parkway. #600
Atlanta, GA 30328
De.orark@mci.com
Ken.woods@mci.com

- ☐ Hand
- ☐ Mail
- ☐ Facsimile
- ☒ Overnight
- ☒ Electronic

Donna Canzano McNulty
MCI, Inc.
1203 Governors Sq Blvd., #201
Tallahassee, FL 32301
Donna.mcnulty@mci.com

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